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COMMISSION STAFF WORKING DOCUMENT
EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Report on the EU-Myanmar/Burma Investment Relations

Accompanying the document

Recommendation for a Council Decision

**authorising the opening of negotiations on an agreement between the European Union
and Myanmar/Burma on investment protection**

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1. BACKGROUND

The recent political and economic developments in Myanmar/Burma have prompted the EU to open a new chapter in its relations with the country. The Council Conclusions of 23 April 2012 on Myanmar/Burma underlined *"the vital contribution the private sector had to make to the development of Myanmar/Burma. It welcomed European companies exploring trade and investment opportunities, by promoting the practice of the highest standards of integrity and corporate social responsibility and working with the authorities, the private sector and the people of Myanmar/Burma to create the best possible regulatory environment"*. On 22 April 2013, the Council lifted all restrictive measures imposed on Myanmar/Burma, with the exception of the arms embargo, and reiterated its commitment to collaborate with Myanmar/Burma in assisting the reform process and contributing to economic, political and social development. It further encouraged responsible trade and investment. **At present there is no Bilateral Investment Treaty between Myanmar/Burma and any EU Member State** and no full-fledged free trade agreement negotiations are foreseen in the near future. On the occasion of the visit of Myanmar/Burma's President U Thein Sein in Brussels on 5 March 2013, the EU and Myanmar/Burma agreed to *"explore the feasibility of an investment agreement"*.

As a consequence of this mutual political intent and in order to guide next steps, this impact assessment analyses the underlying problems in the current EU-Myanmar/Burma investment relationship and possible solutions.

2. STAKEHOLDER CONSULTATIONS

This impact assessment report has been prepared taking into consideration the views expressed by a wide range of stakeholders, including civil society, industry and NGOs. In order to gather those views, the Commission organised an on-line public consultation and also conducted bilateral meetings within the EU, in Myanmar/Burma and in Thailand to complement the public consultation. The consultation showed that companies and trade associations representing business expect Myanmar/Burma to improve as an investment destination within ten years. Respondents reported general difficulties when trying to invest in Myanmar/Burma. Overall, the consultations confirmed strong support for an EU level initiative to improve legal certainty for European investors in Myanmar/Burma.

3. PROBLEM DEFINITION

The economic management by the Myanmar/Burma government over the past decades has left the country with an underdeveloped regulatory framework and fragile rule of law. There is no multilateral investment framework under the World Trade Organisation rules regarding investment protection and no Bilateral Investment Treaty (BIT) between Myanmar/Burma and any EU Member State. Existing Free Trade Agreements (FTA) and BITs between Myanmar/Burma and its

Asian partners disadvantage EU investors who do not enjoy the same level of protection.

3.1. An unpredictable and insecure investment environment in Myanmar/Burma

The more open and liberal investment legislation adopted by Myanmar/Burma's government since 2012 is leading to increased investment from foreign firms in Myanmar/Burma. However, the country's current investment framework leaves many questions unanswered with respect to investor protection and the procedures for admitting foreign investors including high discretion of Myanmar/Burma's authorities and complex approval criteria. Accordingly, EU companies face risks of discrimination in the current unpredictable and insecure investment environment in Myanmar/Burma.

3.2. Lack of level playing field for the EU investors

There is no multilateral investment framework under the World Trade Organisation rules regarding investment protection with no prospects for any change in the near future. As Myanmar/Burma is not a member of OECD, the OECD investment codes the EU adheres to do not apply either.

The EU's bilateral on-going negotiations on investment with a number of third countries include the United States, Morocco, India, China, Thailand, Vietnam, and Malaysia while negotiations with Singapore and Canada have almost been concluded. The commitments contained in these agreements currently being negotiated will provide incentives for EU companies and investors to further invest in these countries, creating a diversion effect of already low EU investments in Myanmar/Burma.

While there is no BIT between Myanmar/Burma and any EU Member State, existing **FTAs and BITs between Myanmar/Burma and its Asian partners** disadvantage EU investors. In particular, Myanmar/Burma has signed six BITs with China, India, the Philippines, Lao PDR, Thailand and VietNam, although only those concluded with China, India and the Philippines are in force. The investment protection clauses included in these BITs ensure a good level of investment protection for their respective investors and investments. Accordingly, EU investors in Myanmar/Burma, who do not enjoy the same level of protection, are disadvantaged compared to investors from China, India and the Philippines.

3.3 Myanmar/Burma has difficulties in providing goods and services that generate value

This problem stems from Myanmar/Burma's several constraints to move up the value chain. A bilateral investment protection agreement should help Myanmar/Burma to diversify its economy away from agriculture and the energy sector, and would also support Myanmar/Burma's capacity to attract EU skilled labour in the economic sectors its government seeks to develop.

4. ANALYSIS OF SUBSIDIARITY

The question of subsidiarity does not arise in the context of this initiative, as it falls within the scope of the common commercial policy. The Lisbon Treaty provides for the European Union to contribute to the progressive abolition of restrictions on foreign direct investment. Articles 3(1)(e), 206 and 207 of the Treaty on the Functioning of the European Union confer exclusive competence to the European Union in the field of foreign direct investment.

5. OBJECTIVES

The EU's general objectives derive from Articles 3(1) (e), 206, 207 TFEU and Article 21 TEU. They stipulate that the EU shall contribute to the progressive abolition of restrictions on trade and foreign direct investment as well as promote the Union's general external action principles and objectives. The above identified problems in EU-Myanmar/Burma investment relations and the EU's general objectives translate into the following specific objectives:

- Improving legal certainty regarding treatment of EU investors in Myanmar/Burma;
- Improving the protection of EU investments in Myanmar/Burma through, among other things, easier access to arbitration and investor-to-state dispute settlement (ISDS);
- Ensuring EU investors are not discriminated in Myanmar/Burma;
- Increasing bilateral FDI flows;
- Supporting sustainable development by encouraging responsible trade and investment while promoting transparency and environmental protection and core labour/human rights.

Myanmar/Burma's key operational objectives:

- Seek to increase Myanmar/Burma's attractiveness as a destination for EU foreign direct investment;
- Attract EU investments in labour-intensive areas including clothing and tourism to diversify Myanmar/Burma's economy beyond natural resources and agriculture;
- Encourage investors to promote Corporate Social Responsibility (CSR) practices in accordance with internationally recognised guidelines and principles in Myanmar/Burma.

6. POLICY OPTIONS

Being a least developed country, Myanmar/Burma benefits from duty free and quota free access to the EU market under the Everything But Arms (EBA) Arrangement. Because of the substantial advantages provided by EBA, there is currently little incentive for Myanmar/Burma to negotiate an FTA with the EU in the short to medium-term. Equally, Myanmar/Burma's authorities have clearly stated that they are not ready to negotiate on market access with any foreign partner and want all foreign investors to be subject to the new Foreign Investment Law enacted in November 2012. Therefore, negotiating on investment liberalisation cannot be envisaged at that stage.

6.1 Option 1: No policy change: A first policy option would be to continue general discussions on investment under the newly established framework of bilateral policy dialogue (EU-Myanmar/Burma Forum) and existing multilateral commitments.

6.2 Option 2: Authorising individual interested EU Member States to negotiate a bilateral investment agreement with Myanmar/Burma: Regulation (EU) No 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between EU Member States and third countries established a mechanism for empowering Member States – under certain conditions– to negotiate bilateral investment agreements with countries not immediately scheduled for the EU-wide investment negotiations. Under this option, interested Member States could request authorisation under Regulation N° 1219/2012.

6.3 Option 3: An EU standalone investment protection agreement: The third policy option for the European Commission would be to negotiate a standalone investment protection agreement between the EU and Myanmar/Burma, which would cover protection, i.e. treatment of investments once undertaken (post-establishment).

To this end, the European Commission would make a recommendation to the Council for negotiating guidelines pursuing the highest level of investment protection possible, notably building on best practices of EU Member State BITs signed with other partners than Myanmar/Burma. This would contain all standard provisions found in recent BIT practice and improve these where possible to ensure more legal certainty and consistency with EU policy objectives.

7. ASSESSMENT OF IMPACTS

7.1 Economic impact

Policy option 1 implies that no actions are taken. Since 2011 Myanmar/Burma's government has made reforms to open its investment policy to attract foreign direct investments and a new EU-Myanmar/Burma framework of bilateral policy dialogue

on trade and investment was launched last June 2013. However, neither of those two recent steps are sufficient to address the magnitude of problems highlighted under section 3.

Policy option 2 consists in granting authorisation to interested EU Member States to negotiate bilateral investment agreements with Myanmar/Burma on a case by-case basis. However, Member State BIT's practice and content vary and, without knowing in advance which Member State(s) would request an authorisation to negotiate a BIT with Myanmar/Burma, it is not possible to assess the impact at this stage. More importantly, it is unlikely that all Member States would request an authorisation to negotiate a BIT with Myanmar/Burma and a patchwork of bilateral investment agreements would lead to an unlevel playing field between investors from different Member States and Myanmar/Burma.

Policy option 3 stipulates the negotiation and conclusion of an EU-Myanmar/Burma investment protection agreement. The absence of any BIT between the EU and Myanmar/Burma means that there is an unlevel playing field between investors from countries already having a BIT with Myanmar/Burma and EU investors in Myanmar/Burma. Policy option 3 is expected to trigger an increase in EU-Myanmar/Burma investment flows and stocks. Available information sources stress the possible impact of an EU FDI increase in several sectors of Myanmar/Burma's economy. Overall, the conclusion is that an improved legal framework for EU companies in Myanmar/Burma would allow them to expand their operations in Myanmar/Burma, increasing their turnover.

7.2 Environmental impact: Overall, **policy option 1** could entail some positive environmental impacts linked to recent steps that are not related to EU investment in Myanmar/Burma.

Under **option 2**, the environmental impacts would be similar to those under option 3 but to a lesser extent.

As a result of **option 3**, we assume that FDI will increase, which will entail both positive and negative impacts on the environment. As for positive impacts, Myanmar/Burma's water resources make investment in the hydropower sector highly attractive which could impact positively on the environment particularly since the electricity produced would not emit greenhouse gases. Equally, agriculture is a key sector of Myanmar/Burma's economy and represents a vast potential for investments. As for negative impacts, extensive investment in mono-plantations such as rubber, teak or other commercial timber species might affect local forest biodiversity conservation, food security and access to resources for the local population.

7.3 Social impact: **Policy option 1** could entail some positive social impacts following the recently launched reform of the labour law in Myanmar/Burma. These impacts are not related to EU investment in Myanmar/Burma.

As for the overall impact of **policy option 2**, the social impacts would be similar to those under option 3 but to a lesser extent.

Policy option 3 should have no impact on employment or on labour rights in the EU, while it should have a positive impact on employment in the manufacturing and services sectors, and neutral to positive impacts on labour rights and working conditions in Myanmar/Burma..

7.4 Human rights impact: It is recalled that **policy option 1** could entail some positive impacts on human rights stemming from the recently launched labour law reform in Myanmar/Burma. As for **policy options 2 and 3**, no impact on human rights in the EU is expected. Assuming that EU FDI will increase in Myanmar/Burma under options 2 and 3, the overall direct impact on human rights of an increase of EU FDI into Myanmar/Burma is expected to be neutral to positive. A standalone investment protection agreement should aim at strengthening the already existing protection of the right to property of investors and would not negatively impact on the rights of persons other than investors. Equally a clause reaffirming the right to pursue legitimate public policy objectives including human rights should provide reassurance to this end.

7.5 Impact of investment protection on states' right to pursue legitimate public policy objectives: there is no clear structural or legal impediment under investment protection agreements for States to pursue public policy objectives. In addition, the negotiating directives for an EU-Myanmar/Burma investment protection agreement would include specific language on the "right to regulate", and to pursue legitimate public policy objectives such as human rights, as well as a reference to corporate social responsibility in line with the EU FTA practice, and additional guidance to arbitration tribunals on the rules of interpretation of the agreement.

7.6 Administrative and budgetary impact: **Policy option 1** should not have an administrative or budgetary impact on public authorities or firms. **Policy Option 2** might mean additional administrative burden on Myanmar/Burma if several EU Member States were to negotiate BITs with the country. It would also create additional burden for the European Commission which would need to empower each Member State individually, as well as a loss of economies of scale if several Member States were negotiating in parallel. **Policy option 3** might trigger some budgetary and administrative burdens for the EU due to managing investor-to-state dispute settlement (ISDS), legal fees and award payments. However, on the basis of the currently available evidence and experience, the likelihood of investor-state disputes arising against the EU under an EU-Myanmar/Burma investment protection agreement appears very small.

8. COMPARISON OF OPTIONS

Policy option 1 would not achieve any of the general, specific or operational objectives of the EU or Myanmar/Burma.

Under **policy option 2**, any EU Member State wishing to enter into negotiation of an investment protection agreement with Myanmar/Burma would have to request an authorisation to do so from the European Commission which is granted under certain conditions and on a case-by-case basis. Therefore not all EU companies would be

afforded the necessary investment protection in Myanmar/Burma and Burmese investors will only be protected in certain Member States of the EU. Moreover, given the human resources constraints of Myanmar/Burma, having parallel negotiations with several EU Member States will be very difficult to carry out in practice for Myanmar/Burma. Option 2 would be feasible albeit unsatisfactory for the EU. Its impacts on human or labour rights and environmental standards in Myanmar/Burma is expected to be neutral to positive, similar to those under option 3 but to a lesser extent.

Policy option 3, which provides for the conclusion of an EU investment protection agreement, would address all five specific objectives of the EU and would have a positive overall impact. It would enhance legal certainty for the protection of EU investors in Myanmar/Burma, ensure EU investors are not discriminated in Myanmar/Burma, and support sustainable development by encouraging responsible trade and investment while promoting transparency and environmental protection and core labour or human rights. This policy option would deliver the highest welfare gains, and have a marginal positive environmental as well as an employment impact.

In conclusion, policy option 3 is the preferred option of the EU.

9. MONITORING AND EVALUATION

The Commission will monitor and evaluate the impact and compliance of a potential future EU-Myanmar/Burma investment protection agreement. There will be an ex post evaluation of the effects of any investment protection agreement concluded with Myanmar/Burma five years after its entry into force and several types of monitoring arrangements could be used.